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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gary Nerdig, et al.,

10 Plaintiffs,

11 v.

12 Electric Insurance Company,

13 Defendant.
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No. CV-17-01859-PHX-GMS

ORDER

15 Pending before the Court is Plaintiffs Motion to Compel and Motion for Sanctions
16 (Doc. 99). For the following reasons, the Court will grant the Motion to Compel and
17 defer a ruling on the Motion for Sanctions.¹

18 **BACKGROUND**

19 In early 2016, Defendant Electric Insurance Company (“Electric”) was initially
20 made aware of Plaintiffs’ potential underinsured motorist (“UIM”) claim. Plaintiffs’
21 counsel sent other letters to Electric in February 2016 asking for Electric to identify
22 documents that would be needed to review the claim. Electric did not respond to the
23 letters.

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26 ¹ Defendant’s request for oral argument is denied because the parties have had an
27 adequate opportunity to discuss the law and evidence and oral argument will not aid the
28 Court’s decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933
F.2d 724, 729 (9th Cir. 1991).

1 On March 20, 2017, Plaintiffs sent a demand letter to both Travelers Insurance and
2 Electric, requesting a payment of the full policy limit. Travelers issued a payment of
3 \$1,000,000 to Mr. Nerdig on March 24, 2017. Electric began evaluating Mr. Nerdig's
4 claim on March 28, 2017, after being informed that the UIM coverage from Travelers
5 was exhausted. Electric then brought on defense counsel on April 12, 2017 to assist in
6 adjusting the claim. Defense counsel requested Mr. Nerdig to undergo an Examination
7 Under Oath, an Independent Medical Examination, and to authorize Electric to obtain
8 additional medical records. Electric's contract with Mr. Nerdig provides that an insured
9 may be required to submit to the above requests. On April 28, 2017, Electric offered
10 Mr. Nerdig \$50,000. On May 7, the claim was reassigned to Electric claims adjuster Tim
11 McNamara. Plaintiffs, Mr. Nerdig and his wife, filed suit on May 15, 2017.

12 Following this Court's Order on Defendant's Motion for Summary Judgment,
13 Plaintiffs' only remaining claims are for bad faith and punitive damages. (Doc. 97).

14 DISCUSSION

15 I. Legal Standard

16 The attorney work product doctrine protects documents that are "prepared in
17 anticipation of litigation or for trial." F.R.C.P. 26(b)(3); *see Hickman v. Taylor*, 329 U.S.
18 495 (1947). The work product doctrine applies not only to work performed by lawyers,
19 but also to work performed by a party's "representative" or "agent," and therefore
20 presumably extends to work performed by Defendant's claims adjusters Alan Hunter and
21 Tim McNamara, so long as that work was prepared in anticipation of litigation. *See*
22 F.R.C.P. 26(b)(3). "The primary purpose of the work product rule is to prevent the
23 exploitation of a party's efforts in preparing for litigation." *Holmgren v. State Farm Mut.*
24 *Auto Ins. Co.*, 976 F.2d 573, 576 (9th Cir. 1992) (internal citations and quotation marks
25 omitted). A document is prepared in anticipation of litigation if "it can fairly be said that
26 the document was created because of anticipated litigation, and would not have been
27 created in substantially similar form but for the prospect of that litigation." *In re Grand*
28 *Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2004).

1 Opinion work product may still be discoverable if mental impressions are at issue
2 in a case and the need for the material is compelling. *Id.* at 577. “In a bad faith insurance
3 claim settlement case, the strategy, mental impressions, and opinion of the insurer’s
4 agents concerning the handling are directly at issue.” *Id.* “Unless the information is
5 available elsewhere, a plaintiff may be able to establish a compelling need for evidence in
6 the insurer’s claim file regarding the insurer’s opinion of the viability and value of the
7 claim.” *Id.*

8 In Arizona, the attorney-client privilege is defined by statute. *See* A.R.S. § 12-
9 2234. For a communication to be protected by the attorney-client privilege, “the
10 communication must be made to or by the lawyer for the purpose of securing or giving
11 legal advice.” *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874
12 (1994) (en banc). “Thus, not all communications to one’s lawyer are privileged.” *Id.*
13 And, merely assigning an attorney to perform an ordinary insurance business function
14 does not “cloak with privilege matters that would otherwise be discoverable.” *Merrin*
15 *Jewelry Co. v. St. Paul Fire Marine Ins. Co.*, 49 F.R.D. 54, 57 (S.D.N.Y. 1970).

16 **II. Analysis**

17 Plaintiffs seek to compel production of several documents, including a Large Loss
18 Report from May 2016, Flash Reports, documents that contain handwritten notes from
19 Mr. Hunter, emails between defense counsel and Mr. Hunter, handwritten notes from
20 Mr. McNamara from after the start of litigation, a medical report prepared by a nurse
21 consultant, Nancy Liebe, email communications between defense counsel and Electric
22 after the lawsuit was filed, and claim notes after defense counsel was brought in to help
23 adjust the claim. Electric argues that all of these materials are work product, and that the
24 emails sent and received by defense counsel and the claim notes after April 12 are
25 additionally protected by attorney client privilege.

26 **1. Materials Protected by the Attorney-Client Privilege**

27 Plaintiffs request all communications between defense counsel and Electric, both
28 before and after this lawsuit was filed, as defense counsel assisted in the claims

1 adjustment process. Since some of the communications between defense counsel and
2 Electric will likely fall within the attorney-client privilege scope, the Court will conduct
3 an *in camera* review of those documents to determine whether any communications
4 “were made to or by the lawyer for the purpose of securing or giving legal advice.”
5 *Samaritn Foundation*, 176 Ariz. at 497.

6 Electric further argues that the claim notes prepared by defense counsel are
7 covered by the attorney-client privilege. But Electric also admits that “no legal advice is
8 dispensed in performing these functions” when they were assisting in the claim
9 adjustment process (Doc. 102 at 9). The attorney-client privilege protects a subset of
10 communications between a lawyer and client—not all tasks performed by a lawyer, legal
11 and non-legal. Because Defendant admits that the claim notes do not contain legal advice,
12 the material is not protected by the attorney-client privilege.²

13 **2. Materials Prepared in Anticipation of Litigation**

14 To be covered by the work product doctrine, materials must be produced “in
15 anticipation of litigation,” which means that the document “would not have been created
16 in substantially similar form but for the prospect of that litigation.” *In Re Grand Jury*
17 *Subpoena*, 357 F.3d at 908. Many of the documents plaintiffs are seeking would have
18 been prepared in a regular claims adjustment process. But Plaintiffs were aggressive in
19 pursuing their claim, first by sending a demand letter, and then by imposing strict
20 deadlines on the claims adjustment process, and refusing to give more time to the adjuster
21 to conduct a review. While many of these same documents may have been created in a
22 typical claims adjustment process, the possibility of litigation may have had an impact on
23 the documents generated in this case.

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25 ² Defendant’s main argument is that the attorney-client privilege has not been
26 waived in this matter because the Defendant is not using advice of counsel as a defense.
27 *See State Farm Mut. Auto Ins. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000). But there is
28 no privilege for Electric to waive when the documents are not protected.

1 Assuming these documents are work product, they may still be discoverable if
2 mental impressions are at issue in this case, and the need for the material is compelling.
3 The remaining claim in this case alleges that Defendant acted in bad faith by offering a
4 lowball amount to settle Plaintiffs' claim. The Court will review the documents *in*
5 *camera* to determine if they have information "regarding the insurer's opinion of the
6 viability and value of the claim." *In Re Grand Jury Subpoena*, 357 F.3d at 577.

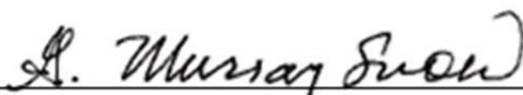
7 **3. Sanctions**

8 Plaintiffs request sanctions because the Defendant did not produce all of the
9 materials in compliance with the MIDP Order (Doc. 3), or note them in the privilege log.
10 The Court will determine whether sanctions will issue after it conducts an *in camera*
11 review.

12 **IT IS HEREBY ORDERED** that the Plaintiff's Motion to Compel (Doc. 99) is
13 **GRANTED IN PART.**

14 **IT IS FURTHER ORDERED** that Defendant shall produce email
15 correspondence with defense counsel, the May 7 Large Loss Report, Ms. Liebe's medical
16 report, Mr. McNamara's claim notes, the Flash Reports, all documents with handwritten
17 notes from Mr. Hunter, and claim notes from defense counsel for the Court's *in camera*
18 review on or before **noon on November 9, 2018.**

19 Dated this 1st day of November, 2018.

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22 G. Murray Snow
23 Chief United States District Judge
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